FILED
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SUPREME COURT, U.S.

No. 98-286

In The

# Supreme Court of the United States

October Term, 1997

BURTON L. FISH and BUFFALO ROAD PROFESSIONALS, PC,

*Petitioners,*

*vs.*

MARSH, SPAEDER, BAUR, SPAEDER & SCHAAF, a Partnership, JOHN C. BRYDON, FRANCIS J. KLEMENSIC and WILL J. SCHAAF and THE OHIO CASUALTY INSURANCE COMPANY,

*Respondents.*

*On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania, Western District*

## RESPONDENTS' BRIEF IN OPPOSITION

JAMES R. FRYLING
*Counsel of Record*
MARSH SPAEDER BAUR
SPAEDER & SCHAAF, LLP
*Attorneys for Respondents*
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## COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the Superior Court of Pennsylvania erred in quashing petitioner's appeal, finding his statement of matters complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b) to be a five-page incoherent dissertation?

2. Whether the Superior Court of Pennsylvania erred in quashing petitioner's appeal, finding that petitioner waived his claims by failing to raise them in the statement of matters complained of on appeal?

3. Whether the Superior Court of Pennsylvania erred in quashing petitioner's appeal on the basis that petitioner cannot collaterally attack the entry of summary judgment against his client in an ongoing case by filing a separate lawsuit against opposing counsel?

## PARTIES TO THE PROCEEDINGS

The petition accurately reflects the parties to the proceeding.

## STATEMENT PURSUANT TO RULE 29.6

The following is the parent of respondent, Ohio Casualty Company: The Ohio Casualty Group of Insurance Companies.

The following are nonwholly owned subsidiaries of The Ohio Casualty Group of Insurance Companies: West American Insurance Company, American Fire & Casualty Company, Ohio Security Insurance Company, and Ocasko Budget, Inc.

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The Opinion and Order dated May 13, 1996, of the Court of Common Pleas of Erie County, Pennsylvania, is not officially reported.

The July 18, 1997 Memorandum Order of the Superior Court of Pennsylvania is not officially reported. The disposition of petitioner's appeal and petition for reargument to the Superior Court of Pennsylvania are reported at __ Pa. Super. __, 701 A.2d 786 (1997).

## STATUTES INVOLVED

The statute here involved is Pennsylvania Rule of Appellate Procedure 1925(b), 42 Pa. Con. Stat., amended May 16, 1979, effective 120 days after June 2, 1979; Dec. 30, 1987, effective Jan. 16, 1988.

> (b) **Direction to file statement of matters complained of.**
>
> The lower court forthwith may enter an order directing the appellant to file of record in the lower court and serve on the trial judge a concise statement of the matters complained of on the appeal no later than fourteen (14) days after entry of such order. Failure to comply with such direction may be considered by the appellate court as a waiver of all objections to the order, ruling or other matter complained of.

## CONCISE STATEMENT OF THE CASE

### A. Procedural History

Petitioner, Attorney Burton L. Fish, and his professional corporation, Buffalo Road Professionals, P.C., commenced this action at law against the respondents, John C. Brydon, Francis J. Klemensic, and Will J. Schaaf, partners in the defendant law firm, Marsh Spaeder Baur Spaeder & Schaaf, by filing a Writ of Summons on May 1, 1995. On May 8, 1995, plaintiffs filed Interrogatories and Request for Admissions which were served upon all defendants. In response, defendants filed a Motion for Protective Order on May 15, 1995. This Motion for Protective Order was granted by the Court of Common Pleas of Erie County, Pennsylvania, on June 26, 1995.

On July 22, 1995, plaintiffs filed a complaint against the Marsh defendants and added The Ohio Casualty Insurance Company as a defendant. Defendants filed preliminary objections in the nature of a demurrer to plaintiffs' complaint. On September 13, 1995, plaintiffs filed a motion to recuse the Honorable Michael T. Joyce from further participation in the litigation. This motion to recuse was denied by the Court on October 3, 1995. On August 16, 1995, plaintiffs filed a motion to disqualify Attorney Brydon as counsel for defendant, Ohio, and a motion for partial summary judgment, as well as a motion to supplement the record.

On May 13, 1996, the Court of Common Pleas of Erie County, Pennsylvania: granted the defendants' preliminary objections and dismissed plaintiffs' complaint with prejudice; granted defendants' motion for attorneys' fees pursuant to 42 Pa. Con. Stat. § 2503(9); denied plaintiffs' motion for partial summary judgment; denied plaintiffs' motion to disqualify Attorney Brydon and granted plaintiffs' motion to supplement

the record (16a-17a). Plaintiffs filed a Notice of Appeal from this order to the Superior Court of Pennsylvania on June 12, 1996. On June 28, 1996, the Court of Common Pleas of Erie County, Pennsylvania, entered an order awarding attorneys' fees against the plaintiffs (14a-15a). The plaintiffs filed a notice of appeal from this order on July 26, 1996.

On July 18, 1997, the Superior Court of Pennsylvania filed a memorandum and judgment quashing the plaintiffs' appeal (1a). On September 12, 1997, the Superior Court of Pennsylvania issued an award of counsel fees to respondent (12a-13a) and, on September 19, 1997, denied petitioners' application for reargument (10a). On March 11, 1998, the Supreme Court of Pennsylvania denied petitioners' petition for allowance of appeal (8a).

**B. Statement of Facts**

This appeal arises from the judgment of the Superior Court of Pennsylvania quashing the petitioners' appeal in awarding counsel fees to the respondents (1a).

The present lawsuit has its genesis in a case in which plaintiffs' attorney, Burton L. Fish, and his professional corporation, Buffalo Road Professionals, P.C., represented his mother, Bertha Fish, and father, Leon Fish, in a personal injury action and claim for uninsured motorist benefits.

IN THE COURT OF COMMON PLEAS
OF ERIE COUNTY, PENNSYLVANIA

LEON C. FISH and BERTHA E. FISH,

Plaintiffs,

v.

PATRICIA McCRAY and DEBRA HELIKER,

Defendants

v.

LEON C. FISH,

Additional Defendant

On October 21, 1987, Leon and Bertha Fish, parents of petitioner, Attorney Burton Fish, were involved in an automobile accident in Erie County, Pennsylvania. Although neither Leon nor Bertha have any recollection of the events prior to or during the accident, the police reports and other evidence reveal that the driver of the other vehicle, Debra Heliker, crossed the center line of the roadway and collided with the Fishes' vehicle. Leon Fish was the operator and Bertha Fish was a passenger. Ms. Heliker, the operator, and Ms. McCray, the owner of the oncoming vehicle, were both uninsured motorists.

Attorney Fish commenced a personal injury action on behalf of his mother and father against both Heliker and McCray. Attorney Fish also filed suit on behalf of his mother, Bertha, against his father, Leon. The Ohio Casualty Group retained the firm of Marsh Spaeder Baur Spaeder & Schaaf and Attorney John C. Brydon to represent Leon Fish as an additional defendant. These lawsuits are currently pending in the Court of Common Pleas of Erie County, Pennsylvania, at Docket No. 2587 - 1989.

**Leon C. Fish and Bertha E. Fish v. Ohio Casualty Group**

Meanwhile, Leon and Bertha Fish, represented by petitioner, Attorney Fish, proceeded to an uninsured motorist arbitration pursuant to a policy of insurance issued by the Ohio Casualty Group to the Fishes. During the uninsured motorist arbitration proceeding, Ohio Casualty, through Attorney Brydon, and the Fishes, through Attorney Fish, agreed to certain stipulations. One stipulation agreed to by the parties was that Leon Fish, as driver, was not contributorily or comparatively negligent in causing the accident. As a direct result of this stipulation, the full single policy limits of the Ohio Casualty uninsured motorist benefits were awarded to the Fishes.

Attorney Fish then continued the personal injury civil action on behalf of Bertha against the driver and owner of the other vehicle and also against his father, Leon. Based upon the prior stipulation that Leon was not negligent, a motion for summary judgment pursuant to the Pennsylvania Rule of Civil Procedure No. 1035 was filed by respondent, Attorney Francis J. Klemensic, on behalf of Leon Fish in the case of *Leon Fish and Bertha Fish v. Patricia McCray and Debra Heliker v. Leon Fish*. This motion was vehemently opposed by petitioner, Attorney Fish. After hearing and upon review of the documents, including the stipulation, the trial court granted the motion for summary judgment, dismissing Leon Fish as an additional defendant. Attorney Fish then filed a Notice of Appeal to the Superior Court of Pennsylvania at Docket No. 49 Miscellaneous 1995. This appeal was dismissed by a *per curiam* order dated May 12, 1995. Attorney Fish then filed a Petition for Review and Application for Relief in the Supreme Court of Pennsylvania, which petition was also dismissed by a *per curiam* order dated October 6, 1995.

Thereafter, Attorney Fish and Buffalo Road Professionals commenced a cause of action by filing a complaint against the

respondents alleging bad faith bargaining, breach of duty to disclose, breach of contract, malicious use of process, abuse of process, tortious outrage, violation of professional ethics, tortious interference with business, conspiracy, perjury, subordination of perjury, fraud, collusion, false pretenses, nondisclosure, misrepresentation, official oppression, obstructing justice, defamation, disparage, intentional infliction of mental distress and vicarious liability. Defendants filed preliminary objections to the complaint in the nature of a demurrer. After the hearing, the lower court granted the plaintiffs' preliminary objections and request for counsel fees against the plaintiffs (A2-5, 11-21).

## REASONS FOR DENYING THE WRIT

The respondents submit that the petitioner, Burton L. Fish, has failed to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257. Respondents contend that the jurisdiction of the Supreme Court of the United States is not properly invoked in this case. In this case, the validity of a treaty or statute of the United States is not drawn into question nor is the validity of a statute of any state being drawn into question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of or any commission held or authority exercised under the United States.

Moreover, petitioner, Attorney Fish, continues to attempt to argue the merits of his appeal, ignoring the fact that the Superior Court of Pennsylvania quashed his appeal on procedural grounds. The Superior Court of Pennsylvania, in quashing Attorney Fish's appeal, found his Statement of Matters Complained of on Appeal Pursuant to Pa. R.A.P. 1925(b) to be, in essence, a five-page, incoherent dissertation as to why

no stipulation existed between clients in the underlying tort case. In addition, the Superior Court of Pennsylvania found the appellant's brief to be in total derogation of the Pennsylvania Rules of Appellate Procedure.

Because none of the claims raised in appellants' brief were included in their statement of matters complained of on appeal pursuant to Pa. R.A.P. 1925(b), these issues were deemed to be waived. *Taylor v. Owens-Corning Fiberglass Corp.*, 446 Pa. Super. 174, 666 A.2d 681 (1995).

Finally, the Superior Court held that all of the issues raised in this litigation relate to the stipulation and subsequent grant of summary judgment in the underlying civil case. As the underlying case is still ongoing, the Superior Court held that the petitioner could not collaterally attack the entry of summary judgment against their client by filing a separate civil complaint against the opposing party's counsel. In essence, it would require the Superior Court of Pennsylvania to reach the merits as to the existence and validity of a stipulation at issue in a collateral proceeding which the Superior Court declined to do. *Commonwealth v. Ryan*, 358 Pa. Super. 459, 517 A.2d 1324 (1986).

## CONCLUSION

This case does not merit further review by this Court. For the foregoing reasons, Attorney Fish's petition should be denied.

Respectfully submitted,

JAMES R. FRYLING
*Counsel of Record*
MARSH SPAEDER BAUR
SPAEDER & SCHAAF, LLP
*Attorneys for Respondents*
Suite 300, 300 State Street
Erie, Pennsylvania 16507
(814) 456-5301

# APPENDIX

## APPENDIX A — JUDGMENT AND MEMORANDUM OF THE SUPERIOR COURT OF PENNSYLVANIA, PITTSBURGH DISTRICT FILED JULY 18, 1997

**SUPERIOR COURT OF PENNSYLVANIA**
**PITTSBURGH DISTRICT**

NOS. 1066 & 1397 PITTSBURGH, 1996

BURTON L. FISH AND BUFFALO ROAD PROFESSIONALS, P.C.,

APPELLANTS

V.

MARSH, SPAEDER, BAUR, SPAEDER & SCHAAF, A PARTNERSHIP, JOHN C. BRYDON, FRANCIS J. KLEMENSIC AND WILL J. SCHAAF AND THE OHIO CASUALTY INSURANCE COMPANY

**JUDGMENT**

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that APPEALS QUASHED. JURISDICTION RELINQUISHED.

BY THE COURT:

s/ Eleanor R. Valecko
DEPUTY PROTHONOTARY

DATED: JULY 18, 1997

*Appendix A*

IN THE SUPERIOR COURT OF
PENNSYLVANIA

NO. 01066 PITTSBURGH, 1996
NO. 01397 PITTSBURGH, 1996

BURTON L. FISH AND BUFFALO ROAD PROFESSIONALS, P.C.,

Appellants

v.

MARSH, SPAEDER, BAUR, SPAEDER ¶ SCHAAF, A PARTNERSHIP, JOHN C. BRYDON, FRANCIS J. KLEMENSIC AND WILL J. SCHAAF AND THE OHIO CASUALTY INSURANCE COMPANY

Appeal from the Orders in the Court of
Common Pleas of Erie County, Civil
Division, No. 1995-11703

BEFORE, TAMILIA, J., FORD ELLIOTT, J., and BROSKY, J.

MEMORANDUM: FILED: JULY 18, 1997

Appellants, Burton L. Fish and Buffalo Road Professionals, P.C., take this appeal, pro se, from the May 13, 1996 Order, inter alia, granting appellees, preliminary objections and dismissing appellants' complaint with prejudice and the June 28, 1996 Order awarding counsel fees to appellees in the amount of $2,312.50.

*Appendix A*

The procedural and factual history is as follows. On October 22, 1987, Leon C. Fish (hereinafter Leon) and Bertha E. Fish (hereinafter Bertha), parents of Plaintiff, Attorney Burton Fish, were involved in a car accident. Although neither Leon nor Bertha could recall any details which preceded or occurred during the accident, the police reports and other evidence indicated that the driver of the other vehicle, Deborah Heliker, crossed the center line and collided with the Fishes' vehicle. It was also revealed that Ms. Heliker was uninsured. Attorney Fish filed suit on behalf of his parents against the uninsured motorist. He also brought suit against his father on behalf of his mother. Ohio Casualty Insurance Company, Leon's insurer, retained Defendant Attorney John Brydon to represent Leon. Meanwhile, Leon and Bertha proceeded to an uninsured motorist arbitration proceeding where both the insured and the carrier, Ohio Casualty, agreed to certain stipulations. Part of the stipulation stated that Leon was not contributorily nor comparatively negligent. Thus, the full single policy limits were awarded to the Fishes. Attorney Fish pursued an action on behalf of Bertha against the driver of the other vehicle and Leon, who it had previously been stipulated was not negligent by a written stipulation in letter form. Subsequently, a motion for summary judgment was filed by Defendant Francis J. Klemensic on behalf of Leon in the case of Bertha versus Leon and Heliker. Attorney Klemensic argued that the prior stipulation during the uninsured motorist arbitration hearing that Leon was not negligent entitled him to

> judgment as a matter of law. During argument, Attorney Fish vehemently insisted that the stipulation of Leon's non-negligence was never entered into even though he recognized that the full limits of coverage could not have been obtained without such finding. After a review of all the documents (including the written letter stipulation) and hearing arguments, the Court granted the motion for summary judgment. Thereafter, Burton Fish and Buffalo Road Professionals filed a complaint against the Defendants alleging bad faith bargaining, breach of duty to disclose, breach of contract, malicious use of process, abuse of process, tortious outrage, violation of professional ethics, tortious interference with business, conspiracy, perjury, subordination of perjury, fraud, collusion, false pretenses, nondisclosure, misrepresentation, official oppression, obstructing justice, defamation, disparagement, intentional infliction of mental distress, and vicarious liability. The Plaintiffs also put before the Court a motion to supplement the record and motion to disqualify Defendant, John Brydon, as counsel.

(Slip Op., Joyce, J., 5/13/96, pp. 1-2.)

In reaching its decision to dismiss appellants' complaint, the trial court analyzed eleven counts of the civil complaint and determined that several of the counts were not recognizable causes of action in Pennsylvania, several others were criminal allegations and the remaining counts were without merit. Appellants thereafter filed a timely notice of appeal followed by a statement of matters complained of on appeal pursuant to

*Appendix A*

Pa.R.A.P. 1925(b), which in essence was a five-page incoherent dissertation as to why no stipulation existed between their clients in the underlying tort case. On appeal to this Court, however, appellants, in a brief in total derogation of the Pennsylvania Rules of Appellate Procedure, raise the following claims:

> 1. Does an attorney's violation of PRCP 222, Attorneys as Witnesses, and Rules of Professional Conduct 3.7, Lawyer as Witness (comment, code comparison), constitute a waiver of judicial immunity?
>
> 2. If not, does any count of Plaintiffs' complaint allege non-privileged conduct, and thereby set forth a viable cause of action?
>
> 3. If any one Count of the complaint does thus set forth a viable cause of action, then are there others, and if so, which ones?
>
> 4. Assuming that one or more Counts set forth viable causes of action, does the Complaint itself reveal a fatal flaw that would justify dismissal, an affirmative defense (res judicata, pendency of another action)?
>
> 5. Were counsel fees properly awarded in this case against plaintiff for obdurate conduct, the mere filing of a praecipe for a writ of summons and a set of interrogatories, when defendants had not to that date disclosed their reliance upon the Brydon letter as an acceptance, despite attempted correspondence with Schaaf?

*Appendix A*

6. Does the lower court's role as a necessary witness require his recusal?

After our review of the record, and to the best of our ability considering appellants' lack of conformity to the Pennsylvania Rules of Appellate Procedure, we find all of the allegations raised in the underlying complaint and in the present appeal relate to the stipulation and subsequent grant of summary judgment in the underlying civil case. Specifically, the trial court made a specific finding in the underlying case, ***Fish v. Helicker and McCray v. Fish,*** *No.* 2587 Erie (1989), that a stipulation did exist and it is now apparent appellants are attempting to relitigate the granting of summary judgment through a separate lawsuit against opposing counsel. In fact, as noted in appellants' brief, the underlying case is still an ongoing matter.[1] Accordingly, we find appellants cannot collaterally attack the entry of summary judgment against their client by filing a separate civil complaint against the opposing party's counsel. In essence, this would require this Court to reach the merits as to the existence and validity of a stipulation at issue in a collateral proceeding. *See* ***Commonwealth v. Ryan,*** 358 Super. 459, 517 A.2d 1324, 1327 (1986) ("Clearly, prior judgments are presumed to be valid and may not be collaterally attacked in a subsequent proceeding.")[2]

---

1. We found nothing in the record pertaining to the underlying action and, therefore, rely on the representation of appellants.

2. We note that none of the claims raised in appellants' brief were included in their Rule 1925(b) statement, thus denying the trial court the opportunity to address the claims and greatly hindering appellate review. In fact, appellants acknowledge this error in their appellate brief. We, therefore, find the failure to raise the issues amounts to a waiver. ***Taylor v. Owens-Corming Fiberglas Corp.,*** 446 Pa. Super. 174, 666 A.2d 681 (1995).

*Appendix A*

Appeals quashed.

Cases dismissed.

Jurisdiction relinquished.

## APPENDIX B — ORDER OF THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT DENYING PETITION FOR ALLOWANCE OF APPEAL DATED MARCH 11, 1996

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Nos. 693-94 Western District
Allocatur Docket 1997

Petition for Allowance of
Appeal from Superior Court

BURTON L. FISH AND BUFFALO ROAD PROFESSIONALS, P.C.,

Petitioner,

V.

MARSH, SPAEDER, BAUR, SPAEDER & SCHAAF, a Partnership, JOHN C. BRYDON, FRANCIS J. KLEMENSIC and WILL J. SCHAAF and THE OHIO CASUALTY INSURANCE COMPANY,

Respondents.

**ORDER**

**PER CURIAM:**

AND NOW, this 11th day of March, 1998, the Petition for Allowance of Appeal is hereby DENIED.

*Appendix B*

A True Copy Candace Y. Fry
as of: March 11, 1998
Attest: s/ Candace Fry
Chief Clerk
Supreme Court of Pennsylvania

**APPENDIX C — LETTER FROM THE SUPERIOR COURT OF PENNSYLVANIA, OFFICE OF THE PROTHONOTARY TO BURTON L. FISH, ESQUIRE DENYING APPLICATION REQUESTING REARGUMENT DATED SEPTEMBER 19, 1997**

**THE SUPERIOR COURT OF PENNSYLVANIA**
**OFFICE OF THE PROTHONOTARY**
**1015 GRANT BUILDING**
**PITTSBURGH, PENNSYLVANIA 15219**

**DAVID A. SZEWCZAK, ESQUIRE**
**PROTHONOTARY** **(412) 565-7592**

**ELEANOR R. VALECKO**
**DEPUTY PROTHONOTARY**

September 19, 1997

Burton L. Fish, Esquire
5218 Buffalo Road
P.O. Box 7185
Erie, PA 16510

IN RE: Burton L. Fish, etc. v. Marsh, Spaeder, et al.
*Nos. 1066 & 1397 Pittsburgh, 1996*

Dear Mr. Fish:

The Court has entered the following Order on your Application for Reargument on the above-captioned matter:

"ORDER OF COURT

*Appendix C*

The court hereby DENIES the application filed August 1, 1997 requesting reargument or reconsideration of the decision dated July 18, 1997.

DATE: September 19, 1997.

PER CURIAM"

Very truly yours,

/s/ Eleanor R. Valecko
DEPUTY PROTHONOTARY

ERV: kks
cc: William J. Schaaf, Esquire
Honorable Michael Joyce

## APPENDIX D — LETTER FROM THE SUPERIOR COURT OF PENNSYLVANIA, OFFICE OF THE PROTHONOTARY TO WILLIAM J. SCHAAF, ESQUIRE GRANTING APPLICATION FOR COUNSEL FEES DATED SEPTEMBER 12, 1997

**THE SUPERIOR COURT OF PENNSYLVANIA**
**OFFICE OF THE PROTHONOTARY**
**1015 GRANT BUILDING**
**PITTSBURGH, PENNSYLVANIA 15219**

**DAVID A. SZEWCZAK, ESQUIRE**
**PROTHONOTARY** **(412) 565-7592**

**ELEANOR R. VALECKO**
**DEPUTY PROTHONOTARY**

September 12, 1997

William J. Schaaf, Esquire
Suite 300
300 State Street
Erie, PA 16507

IN RE: Burton L. Fish and Buffalo Road v. Marsh, Spaeder, et al.
*Nos. 1066 & 1397 Pittsburgh, 1996*

Dear Mr. Schaaf:

The Court has entered the following Order on your Application for Counsel Fees in the above-captioned matter:

*Appendix D*

"ORDER

AND NOW, to-wit, this 12th day of September, 1997, upon consideration of appellees' Application for Counsel Fees in the amount of $11,145.00, said application is hereby granted.

PER CURIAM"

A Certified copy of the Order is being forwarded to the court below.

Very truly yours,

s/ Eleanor R. Valecko
DEPUTY PROTHONOTARY

ERV:kks
cc: Burton L. Fish, Esquire
Honorable Michael Joyce

## APPENDIX E — ORDER OF THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA DATED JUNE 28, 1996

IN THE COURT OF COMMON PLEAS
OF ERIE COUNTY, PENNSYLVANIA

NO. 11703 - 1995

BURTON L. FISH and BUFFALO ROAD PROFESSIONALS,

Plaintiffs

v.

MARSH, SPAEDER, BAUER, SPAEDER & SCHAAF, a Partnership, JOHN C. BRYDON, FRANCIS J. KLEMENSIC and WILL J. SCHAAF,

Defendants

**ORDER**

**AND NOW,** this 28th day of June, 1996, a hearing was held to assess the amount of attorney's fees to be paid by the Plaintiffs, Burton L. Fish and Buffalo Road Professionals to the Defendant pursuant to an Order and Opinion dated May 13, 1996. Upon consideration of the evidence received during the hearing, and pursuant to 42 Pa. C.S.A. § 2503(9), it is hereby **ORDERED, ADJUDGED and DECREED** that the Plaintiffs pay Defendant Attorney William J. Schaaf the amount of $1,750.00 for 14 hours of work at the rate of $125.00 per hour, and Defendant Attorney Will J. Schaaf the amount of $562.50 for 4.5 hours of work at $125.00 per hour, for a total of $2,312.50. Let it be noted that during the hearing the Court

computed the total cost to be $1,812.50. This was a mathematical error and the correct amount is as set forth above.

BY THE COURT:

s/ Michael T. Joyce
MICHAEL T. JOYCE, JUDGE

c: Burton L. Fisk Esq.
William J. Schaaf Esq.

## APPENDIX F — ORDER AND OPINION OF THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA DATED MAY 13, 1996

IN THE COURT OF COMMON PLEAS
OF ERIE COUNTY, PENNSYLVANIA

NO. 11703 - 1995

BURTON L. FISH and BUFFALO ROAD PROFESSIONALS, P.C.,

Plaintiffs

V.

MARSH, SPAEDER, BAUER, SPAEDER & SCHAAF, a Partnership, JOHN C. BRYDON, FRANCIS J. KLEMENSIC and WILL J. SCHAAF, and THE OHIO CASUALTY INSURANCE COMPANY,

Defendants

### ORDER

AND NOW, to-wit, this 13th day of May, 1996, after considering the arguments, motions and briefs of counsel, it is hereby **ORDERED, ADJUDGED and DECREED** that the Defendants' Preliminary Objections to the Plaintiffs' Complaint are **GRANTED** and the Complaint is dismissed with prejudice. Defendants' Motion seeking attorneys' fees pursuant to 42 Pa. C. S.A. §2503(9) is granted. Plaintiffs' Motion for Partial Summary Judgment is denied as is the Motion to Disqualify Counsel John Brydon. However, the Plaintiffs' Motion to Supplement the Record is **GRANTED**. A hearing to determine

appropriate attorneys' fees is scheduled for Friday, June 28, 1996 at 1:30 p.m. in Courtroom D.

BY THE COURT:

s/ Michael T. Joyce
MICHAEL T. JOYCE, JUDGE

*Appendix F*

IN THE COURT OF COMMON PLEAS
OF ERIE COUNTY, PENNSYLVANIA

NO. 11703 - 1995

BURTON L. FISH and BUFFALO ROAD
PROFESSIONALS, P.C.,

Plaintiffs

V.

MARSH, SPAEDER, BAUER, SPAEDER & SCHAAF, a Partnership, JOHN C. BRYDON, FRANCIS J. KLEMENSIC and WILL J. SCHAAF, and THE OHIO CASUALTY INSURANCE COMPANY,

Defendants

**OPINION AND ORDER**

Burton L. Fish, Esq. on behalf of Plaintiffs
Will J. Schaaf, Esq. on behalf of Defendants

Joyce, J., May 13th 1996.

This matter is before the Court on the Defendants' Preliminary Objections to Plaintiffs' Complaint. For the following reasons, the Defendants' Preliminary Objections are granted.

The procedural and factual history is as follows. On October 22, 1987, Leon C. Fish (hereinafter Leon) and Bertha

*Appendix F*

E. Fish (hereinafter Bertha), parents of Plaintiff, Attorney Burton Fish, were involved in a car accident. Although neither Leon nor Bertha could recall any details which preceded or occurred during the accident, the police reports and other evidence indicated that the driver of the other vehicle, Deborah Heliker, crossed the center line and collided with the Fishes' vehicle. It was also revealed that Ms. Heliker was uninsured. Attorney Fish filed suit on behalf of his parents against the uninsured motorist. He also brought suit against his father on behalf of his mother. Ohio Casualty Insurance Company, Leon's insurer, retained Defendant Attorney John Brydon to represent Leon. Meanwhile, Leon and Bertha proceeded to an uninsured motorist arbitration proceeding where both the insured and the carrier, Ohio Casualty, agreed to certain stipulations. Part of the stipulation stated that Leon was not contributorily nor comparatively negligent. Thus, the full single policy limits were awarded to the Fishes. Attorney Fish pursued an action on behalf of Bertha against the driver of the other vehicle and Leon, who it had previously been stipulated was not negligent by a written stipulation in letter form. Subsequently, a motion for summary judgment was filed by Defendant Francis J. Klemensic on behalf of Leon in the case of Bertha versus Leon and Heliker. Attorney Klemensic argued that the prior stipulation during the uninsured motorist arbitration hearing that Leon was not negligent entitled him to judgment as a matter of law. During argument Attorney Fish vehemently insisted that the stipulation of Leon's non-negligence was never entered into even though he recognized that the full limits of coverage could not have been obtained without such finding. After a review of all the documents (including the written letter stipulation) and hearing arguments, the Court granted the motion for summary judgment. Thereafter, Burton Fish and Buffalo Road Professionals filed a complaint against the Defendants alleging bad faith bargaining,